(1) Supreme Court, U.S.
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In The
**Supreme Court of the United States**

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Greg Hunt
Petitioner
v.
Nancy Perry
Respondent

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On Petition for Writ of Certiorari
To the Arkansas Supreme Court

# PETITION FOR WRIT OF CERTIORARI

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## Questions

The following question arises from a grandparent visitation court order which was upheld by the Arkansas Supreme Court. The Court upheld a previous trial court ruling that the GPVA was not unconstitutional and the attack on its constitutionality was barred by the doctrine of *res judicata.* Subsequent to the ruling by the trial court the state Supreme Court had declared the GPVA unconstitutional, but declined to retroactively apply the ruling to the instant case. The state Supreme Court stated that "no Arkansas court has addressed the specific issue of whether a change in the law constitutes a change in circumstances warranting modification of a visitation order. It appears that other jurisdictions have addressed such an issue and reached differing results."

1. Is the failure to retroactively apply a finding that the GPVA is unconstitutional an unconstitutional infringement on a fit parent's right of custody and control under the 14th Amendment of the US Constitution and a violation of the Constitution's Supremacy Clause?

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## Citations of the Published and Unpublished Opinions in this Case

Petition for Rehearing Brief for Greg Hunt

## Statement of Jurisdiction

On January 15, 2004, the Arkansas Supreme Court denied without comment a Petition for Rehearing to review a published opinion issued December 11, 2003 in the case of Greg Hunt vs. Nancy Perry, No. 03-420. The petition for review resulted from a trial court ruling on December 11, 2002, that ruled that the failure of the petitioner to appeal a previous finding made April 4, 2001 that the grandparents visitation act (GPVA) was constitutional, was *res judicata.* This ruling was upheld by the Arkansas Supreme Court. Subsequent to the trial court ruling of April 4, 2001, the grandparents visitation law was declared unconstitutional. Petitioner then filed a petition to vacate the April 4, 2001 ruling on the grounds that the declaration the GPVA was unconstitutional created a change in circumstances warranting termination of the visitation. The Arkansas Supreme Court upheld the trial court ruling, and also ruled it was a case of first impression, stating that other jurisdictions had differing results on addressing this question. The United States Supreme Court has jurisdiction in this matter under Rule 11(c).

> "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or[and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." [added by Petitioner to clarify the claim]

It is Petitioner's contention that this action has violated his constitutional right to due process under the 14th Amendment of the U.S. Constitution, and further violates the Supremacy Clause of the U.S. Constitution, and should be reversed.

## Notice of Service Pursuant to Rule 29

This document has been served by mail on the attorney of record for the opposing party. In addition, pursuant to 28 U.S.C. § 2403(b) this was also served on the Attorney General of the State of Arkansas since a ruling of the Arkansas Supreme Court is being appealed. Proof of service accompanied this document when it was filed with the United States Supreme Court.

## Material Facts of the Case

Greg Hunt is the father of two children, whose mother, Karen Hunt, died October 6, 1999. Prior to the death of Karen, her mother, Nancy Perry, visited on a regular basis and had regular contact with the children, and this continued after the death of Karen. On February 4, 2000, Greg remarried, and sometime later the relationship with Nancy began to deteriorate. On August 2, 2000, Greg and his new wife, Gretchen, sent Nancy a letter notifying her that she would be restricted in seeing the children, to once every three months for a period of three hours with the entire Hunt family present. On August 21, 2000 Nancy filed a petition seeking visitation with the children. Greg challenged this, arguing that the Grandparents Visitation Act (GPVA) was unconstitutional and that visitation was not in the best interests of the children. The State intervened on November 1, 2000, arguing the GPVA was constitutional. Immediately prior to the commencement of the litigation the US Supreme Court handed down **Troxel v. Granville, 530 U.S. 57 (2000)** invalidating Washington's grandparents visitation statute. The trial court ruled that the GPVA was constitutional because it was more restrictive than that in **Troxel.** On April 4, 2001 Nancy was granted visitation, and Greg did not appeal the finding of the court.

On May 8, 2002 Greg filed a petition to terminate the visitation based on the fact that the GPVA had been declared unconstitutional by the Arkansas Supreme Court in 2002 in another case, and that this constituted a change in

circumstances warranting termination. Nancy responded that Greg was barred from relitigating the issue of the GPVA's constitutionality because he had failed to appeal the trial court's previous order finding the statute was constitutional. Nancy's motion was granted on November 25, 2002.

Greg appealed this ruling to the Arkansas Supreme Court, arguing that the trial court erred in ruling that his argument that the GPVA is unconstitutional was barred by the doctrine of *res judicata.* Nancy argued that the trial court should be upheld as all elements of the doctrine of *res judicata* were satisfied in the case. The Arkansas Supreme Court, in a ruling dated 11 December, 2003, filed of record January 15, 2004 ruled that Greg's argument was barred by the doctrine of *res judicata.*

The Arkansas Supreme Court ruled that this was a case of first impression and required development of the law, as to whether the doctrine of *res judicata* precludes the finding that the GPVA is unconstitutional can be used to modify visitation orders. The court stated that it takes a more flexible approach in custody matters on applying the doctrine. The court stated that no Arkansas court has addressed the specific issue of whether a change in the law constitutes a change in circumstances warranting modification of a visitation order, but that other jurisdictions which have addressed such an issue have reached differing results. Oklahoma, in **Ingram v. Knippers, 72 P. 3d 17 (Okla. 2003)** held that a party who had agreed to an order granting grandparent visitation rights could not collaterally attack that order by arguing the grandparent visitation statute was unconstitutional; the parent was required to show a change in circumstances. Further, the Oklahoma court held that a judgment based on a statute which is later declared unconstitutional "is not void so as to be subject to collateral attack" but at most voidable and subject only to direct attack. However, Texas has specifically addressed the issue and

ruled in the case of **See in the Interest of T.J.K., 62 S.W.3d 830 (Tex. Ct. App. 2001)** that a change in the law can constitute a change in circumstances, stating:

> "If a statute that authorized a term or condition of visitation is declared unconstitutional, that change should operate like any other change in circumstances that potentially makes the order unworkable or inappropriate."

The Arkansas Supreme Court then goes on to state that the Texas case did not discuss *res judicata*, and that they were more persuaded by the Oklahoma Supreme Court rationale. The Arkansas Supreme Court, in a footnote to its opinion, stated that the fact that the U.S. Supreme Court had vacated and remanded the Arizona court order on grandparents visitation in **Dodge v. Graville, 533 U.S. 945 (2001)** was of no import to the case at hand.

Greg's attorney filed a motion for a rehearing, pointing out that in **Dodge, supra,** the U.S. Supreme Court was unrestrained by "*res judicata*", "*untimeliness*", or "*policy of repose*" in reversing and remanding an unconstitutional state court order, nor was it restrained in ruling in the case of **Orr v. Orr, 440 U.S. 268 (1979)**, where the constitutional challenge was not made until ten years after the decree was handed down. This motion for rehearing was denied by the Arkansas Supreme Court on January 15, 2004.

**Argument for Question 1:**

**Is the failure to retroactively apply a finding that the GPVA is unconstitutional an unconstitutional infringement on a fit parent's right of custody and control under the 14th Amendment of the US Constitution and a violation of the Constitution's Supremacy Clause ?**

"It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." **Troxel v. Granville, 530 U.S. 57**

**(2000)**

In the Opinion handed down by the Arkansas Supreme Court[1], the court states that immediately prior to the start of the litigation, **Troxel** was handed down, but that the trial court ruled it did not apply to the Arkansas GPVA. Greg did not appeal this ruling. Subsequently, in **Linder v. Linder, 348 Ark. 322, 72 S.W. 3d 841 (Ark. 2000)** most of the GPVA was declared unconstitutional based on **Troxel.** Greg then filed a motion seeking to terminate visitation, which the trial court denied and the ruling was upheld. This ruling must fail, because under **Dodge v. Graville, 533 U.S. 945 (2001)** it should be applied retroactively. Further, the failure of the Arkansas Supreme Court to apply this retroactively is in violation of the Constitution's Supremacy Clause, as set out in **Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995). Reynoldsville** specifically states that when the Court decides a case and applies a new legal rule of that case to the parties before it, then it and other courts must treat the same rule as retroactive to pending cases, whether or not they involve predecision events. The trial court did not do so in this instance.

Further, the U.S. Supreme Court has ruled in **Orr v. Orr, 440 U.S. 268 (1979)** that the failure of the appellant to timely challenge the constitutionality of the statute was not a bar to challenging the statute. This fact and the fact that the Court also was unrestrained by arguments of *res judicata, untimeliness* or *policy of repose* was argued to the Arkansas Supreme Court in the Petition for Rehearing filed by Greg's Attorney[2]. The Petition was denied and no reasons were provided[3]. The situation here is similar to the situation set forth in **Reynoldsville.**



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[1] Full content of this order dated December 11, 2003 is contained in the Appendix.

[2] Full content of this Petition is contained in the Appendix.

[3] Full content of this ruling is contained in the Appendix.

The U.S. Supreme Court should accept this case to help clarify what intrusions into the family are acceptable and to set out guidelines for the various states to follow, since there is a conflict between whether **Troxel** should be applied retroactively. Without Supreme Court intervention in cases such as this, a fit parent's right of custody and control of their children is a hollow right. This is especially applicable when state courts are unwilling to retroactively apply the **Troxel** ruling even when it was raised in the trial courts, simply because the party did not (or was not financially able to) take the matter up on appeal, resulting in higher courts ruling that the decision is barred under *res judicata.* This will also serve to set out a common standard to be used by the state courts in such type of cases.

**Conclusion of Arguments**

The instant case results from the court failing to retroactively apply a finding that the GPVA is unconstitutional, even though the theory was raised at the time that **Troxel** was decided. It was done despite court knowledge that the United States Supreme Court had all ready ruled that a timely failure to raise the argument was not a bar to challenging the grandparent visitation acts in other jurisdictions. The judicial system in the State of Arkansas has ruled that it will not retroactively apply the finding that the GPVA was unconstitutional in cases that were pending when **Troxel** was decided. There is no other location for judicial protection from this action other than the United States Supreme Court. Without the Supreme Court taking this case this precedent becomes law in Arkansas and will likely be quoted as precedent in other states in other courts addressing the question of whether to retroactively apply **Troxel.**

**Respectfully Submitted** this 14th day of April, 2004.

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## Appendix

1. **Opinion of Arkansas Supreme Court dated December 11, 2003**
2. **Petition for Rehearing Brief for Greg Hunt**
3. **January 15, 2004 ruling denying the rehearing**
4. **Mandate of Affirmed Law on December 11, 2003 ruling**

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11 December 2003
SUPREME COURT OF ARKANSAS
No. 03-420
Opinion Delivered DECEMBER 11, 2003
GREG HUNT, APPELLANT;
VS.
NANCY PERRY, APPELLEE;

APPEAL FROM THE YELL COUNTY CIRCUIT COURT, SOUTHERN DISTRICT; NO. E-00-88;
HON. DAVID H. McCORMICK, JUDGE;
AFFIRMED.

DONALD L. CORBIN, Associate Justice
This case presents another challenge to the Arkansas Grandparent Visitation Act ("GPV A"), codified at Ark. Code Ann. § 9-13-103 (Repl. 2002).1 Appellant Greg Hunt appeals the order of the Yell County Circuit Court denying his petition to terminate Appellee Nancy Perry's visitation rights with his two children. On appeal, Hunt argues that the trial court erred in ruling that *res judicata* barred his challenge to the constitutionality of the GPV A. He also argues that the trial court erred in failing to find that there had been a change in circumstances warranting termination. As this appeal involves an issue of first impression and requires development of the law, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1) and (5). We affirm.

Greg Hunt is the father of two children, Ali and Seth. The children's mother, Karen Hunt, died on October 6, 1999. Prior to her death, she and Greg adopted Ali, who was born on March 26, 1995. Seth was born to the couple on December 26, 1997. Prior to the death of Karen, Karen's mother, Nancy Perry, visited the family regularly and had regular contact with her grandchildren. Immediately

following Karen's death, Nancy continued to visit her son-in-law and grandchildren. On February 4, 2000, Greg married Gretchen Hunt, who had three children of her own. Greg sought to adopt Gretchen's children, and she did the same with his. While the record is not clear as to the cause, it is apparent that Greg's relationship with Nancy began to deteriorate sometime after his remarriage. This deterioration culminated in Greg and Gretchen sending Nancy a letter notifying her that she would be allowed to see her grandchildren once every three months for a period of three hours, with the entire Hunt family present. This letter was dated August 2, 2000.

Soon after, on August 21, 2000, Nancy filed a petition seeking visitation with Ali and Seth, pursuant to section 9-13-103. Greg challenged Nancy's attempt to obtain visitation, arguing that the GPV A was unconstitutional and that visitation was not in the best interests of his children. The State intervened in the action on November 1, 2000, arguing that the GPV A was constitutional. Immediately prior to the commencement of this litigation, the United States Supreme Court handed down *Troxel v. Granville,* 530 U.S. 57 (2000), invalidating a Washington statute permitting grandparent's visitation. Greg filed a motion for summary judgment on August 30, 2000, arguing that in light of the Supreme Court's decision in *Troxel* the court should find the Arkansas statute unconstitutional as well. Following a hearing on the summary judgment motion, the trial court entered an order finding that the Arkansas statute was not rendered invalid by the decision in *Troxel* because Arkansas's statute was much more restrictive.

On April 4, 2001, the trial court entered an order granting Nancy's petition for visitation. Pursuant to the court's order, Nancy was granted visitation with Ali and Seth once a month for a twenty-four-hour period. Greg did not appeal this order.

On May 8, 2002, Greg filed a petition seeking to terminate Nancy's grandparent visitation. Therein, he alleged that this court's decision in two recent cases rendered the Arkansas GPVA unconstitutional and asserted that those decisions constituted a change in circumstances warranting termination. Greg also averred that visitation was no longer in the best interests of his children due to a change in personal circumstances. In response, Nancy filed a motion for partial summary judgment, arguing that Greg was barred from relitigating the issue of the GPV A's constitutionality because he failed to appeal the trial court's previous order finding the statute constitutional. Nancy's motion was granted on November 25, 2002.

The trial court then held a hearing on December 11, 2002, to determine *if* there had been a change in circumstances that warranted a termination of Nancy's visitation. Charlotte Carlson, a licensed professional counselor, testified that she was contacted by Gretchen and Greg Hunt in June 2000, about concerns over the blending of their two families. Carlson testified that she was present in the Hunt's home during Nancy's first court-ordered visitation. According to Carlson, Nancy refused to shake her hand or even make eye contact with her. Carlson further testified that since the visits with Nancy began, she has noticed behavioral changes in both Ali and Seth. Specifically, she noted that Ali was difficult to separate from her parents, probably due to the child having abandonment issues. During one *visit* with Carlson, Ali spontaneously stated that she did not want to *visit* her grandmother anymore. Carlson stated that Ali complained about her grandmother forcing her to watch videos and look at pictures of her mother, Karen. Carlson also said that Seth once said, "I just want to rip her head off." When Carlson asked Seth who he was talking about he replied, "Grandma, grandmother's." Despite the behavioral changes in the children, Carlson stated that she had never

recommended terminating visitation with Nancy, but that she did believe some kind of change needed to be made. On cross-examination, Carlson stated that she would recommend that the grandparent visitation occur under parental control, specifically that Nancy should participate in family activities.

Greg testified at that hearing that since his children had been visiting Nancy, he has noticed a change in their demeanor. Specifically, he testified that when Ali and Seth return from a visit, it takes them a couple of days to open up again. He stated that he had noticed problems with Ali and her schoolwork. Greg also stated that since the visitation started, Seth breaks out in hives over his entire body. According to Greg, the court-ordered visits also interfere with the way that he and Gretchen are trying to raise all of their children.

Also testifying was Jennifer Hawkins, a teacher at the Plainview-Dover School. Hawkins stated that she taught Ali during the past school year. At the beginning of the year, Hawkins gave the students an assignment to express what makes them happy and what makes them unhappy. According to Hawkins, Ali stated that what makes her happy *"is* not going to my grandmother's house" and what makes her unhappy *"is* going to my grandmother's house."

Finally, Dr. Steven Shry, a clinical psychologist, testified that he had evaluated Ali and Seth in connection with this case. He stated that nothing about the tests he conducted or his personal interaction with the children led him to believe that they had a problem visiting their grandmother.

At the conclusion of the testimony, the trial court ruled from the bench that the petition to terminate would be denied. He noted that the biggest change in circumstances since visitation was ordered was the fact that Greg and Gretchen had consolidated their families through the adoption process,

but that such change was not significant enough to warrant modification of the visitation. The court recognized that there was evidence of some behavioral problems with the children, but stated that it was not possible to determine whether those problems stemmed from the visitation with Nancy or the blending of Greg's and Gretchen's families. The trial court concluded that there were no material and significant changes in circumstances to warrant termination or modification of the previous order.

The trial court subsequently entered two orders on December 26, 2002. In the first order, the trial court ruled that the previous order determining that the GPV A was constitutional was *res judicata* and, thus, Greg was barred from relitigating that same issue. In the second order, the trial court held that there were no material changes that warranted termination of Nancy's visitation rights. Greg flied a motion for reconsideration and new trial on January 6, 2003, arguing that the trial court erred in ruling that *res judicata* barred him from relitigating the issue of the constitutionality of the statute. The trial court denied his motion on January 13, 2003. This appeal followed.

For his first point on appeal, Greg argues that the trial court erred in ruling that his argument that the GPV A is unconstitutional was barred by the doctrine of *res judicata.* In support of this argument, Greg points out that this court had not yet handed down either *Linder,* 348 Ark. 322, 72 S.W.3d 841, or *Seagrave,* 349 Ark. 433, 79 S.W.3d 339, and, thus, he did not have the benefit of the constitutional analysis enunciated in those cases.2 Nancy argues that the trial court was correct in its ruling, as all of the elements of *res judicata* are satisfied in this case. We agree that *res judicata* applies in this case.

*Res judicata* means a thing or matter that has been definitely

and finally settled and determined on its merits by the decision of a court of competent jurisdiction. *Crooked Creek, III, Inc. v. City of Greenwood,* 352 Ark. 465, 101 S.W.3d 829 (2003); *JeToCo Corp. v. Hailey Sales Co.,* 268 Ark. 340, 596 S.W.2d 703 (1980). The doctrine of *res judicata* bars the relitigation of claims that were actually litigated in the first suit, as well as those that could have been litigated. *Linder,* 348 Ark. 322, 72 S.W.3d 841; *State Office if Child Support Enforcem't v. Willis,* 347 Ark. 6, 59 S.W.3d 438 (2001). The underlying policy of *res judicata* is to prevent parties from relitigating issues or raising new issues when they have already been given a fair trial. *Id.*

In *Linder,* 348 Ark. 322, 72 S.W.3d 841, this court noted that the application of *res judicata* in the context of custody cases is somewhat different and stated:

Custody matters, however, are different when the doctrine of *res judicata* is called into play. When the matter is a custody issue, our court takes a more flexible approach to *res judicata.* We recognize, for example, that custody orders are subject to modification in order to respond to changed circumstances and the best interest of the child. *Mood v. Marquez* 338 Ark. 636, 999 S.W.2d 678 (1999); *Thurston v. Pinkstqff,* 292 Ark. 385, 730 S.W.2d 239 (1987). For example, in *Tucker v. Tucker,* 195 Ark. 632,636, 113 S.W.2d 508,508 (1938), we said:

The judgment of a chancery court in this state, awarding the custody of an infant child to one of the parents, or to any other person, is a final judgment, from which an appeal lies, but it is not res judicata in the same or another court of this state involving the custody of the same child, where it is shown that the conditions under which the former decree was made have changed and that the best interest of said child demand a reconsideration of said order or decree.

*Id.* at 339-40, 72 S.W.3d at 850.

Greg argues that this court's recent decisions invalidating the GPV A constitute a change in conditions that precludes the application of *res judicata,* as envisioned by this court in *Linder.* Nancy counters that the trial court correctly relied on this court's decision in *Bayles v. Bayles,* 268 Ark. 120, 594 S.W.2d 17 (1980), in determining that *res judicata* barred relitigation of the issue of the constitutionality of the GPV A. Thus, we begin our analysis of this issue with *Bayles.*

In *Bayles,* this court was faced with the issue of whether a decree awarding alimony that was based on a statute, later declared to be unconstitutional, could be reversed. In that case, the appellant never challenged the constitutionality of a statute that granted alimony only to a wife and not to a husband. The appellant only raised his challenge after the United States Supreme Court declared a similar statute unconstitutional in *Orr v. Orr,* 440 U.S. 268 (1979). The trial court agreed with the appellant that the alimony statute was unconstitutional, but held that the original order awarding alimony remained valid because of the appellant's failure to challenge the constitutionality prior to the time the order was entered.

On appeal, the appellant argued that *res judicata* was not applicable because alimony is a continuous payment that is always subject to modification because of changed circumstances. This court noted that "where a judgment is based upon rights conferred by a statute later declared unconstitutional, the doctrine of *res judicata* bars the relitigation of the case in which it was rendered, or the reopening of the judgment after it has become final." *Bayles,* 268 Ark. at 123, 594 S.W.2d at 19 (citing *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940)). This court agreed that an award of alimony could be subject

to review, but only if there were changes in the circumstances of the parties. The court then concluded that a decree for alimony was *res judicata* on the circumstances prevailing at the time of the decree. Further, in rejecting the appellant's argument, this court also noted that it would be inequitable to strike the provision for alimony where such an allowance was only one factor in the division of the marital estate.

Relying on our decision in *Bayles,* the trial court granted Nancy's partial summary-judgment motion, stating:

2. The current proceeding in the above styled case involves the same parties who litigated the previous action and involves the same legal issue, namely, the constitutionality of the Arkansas Grandparents Visitation Act.

3. Pursuant to the precedents handed down by the Arkansas Supreme Court in the cases of *Linder v. Linder,* 348 Ark. 322, 72 S.W.3d 841 (2002), and *Bayles v. Bayles,* 268 Ark. 120, 594 S.W.2d 17 (1980) the issue of the constitutionality of the Arkansas Grandparents Visitation Act is res judicata and Plaintiffs Motion for Partial Summary Judgment should be granted.

Although *Bayles* is instructive generally on the issue of the effect of a statute being declared unconstitutional, no Arkansas court has addressed the specific issue of whether a change in the law constitutes a change in circumstances warranting modification of a visitation order. It appears that other jurisdictions have addressed such an issue and reached differing results.

In *Ingram v. Knippers,* 72 P.3d 17 (Okla. 2003), the Supreme Court of Oklahoma stated that a party who had agreed to an

order granting a grandfather visitation rights could not collaterally attack that order by arguing that the State's grandparent-visitation statute was unconstitutional; rather, the mother was required to show a change in circumstances. In reaching this conclusion, the Oklahoma court stated:

Even if the grant of grandparental visitation had been pursuant to title 10, section 5, the order is not subject to collateral attack on the grounds that section 5 was declared unconstitutional. A judgment based on a statute which is later declared unconstitutional "is not void so as to be subject to collateral attack" but at most voidable and subject only to direct attack. *Fitzsimmons v. City of Oklahoma City,* 1942 OK 422, ¶ 8, 135 P.2d 340, 343. Applying this rule, a grant of grandparental visitation made under the authority of section 5 is "voidable and subject to direct attack, but it [is] not void so as to be subject to a collateral attack." *Fitzsimmons,* 1942 OK 422 at ¶ 8, 135 P.2d at 343.

*Id.* at 21. The Oklahoma court further discussed the requirement that a party must show a change of circumstances in order to modify a visitation order. While the court did not specifically address the issue of whether a change in the law constituted a change in circumstances, it can be inferred from the decision that the court required a change in personal circumstances. Specifically, the court noted that the mother could not relitigate the issue of harm without showing a change in circumstances.

Another jurisdiction has specifically addressed this issue and ruled that a change in the law can constitute a change in circumstances. *See In the Interest of T.J.K,* 62 S.W.3d 830 (Tex. Ct. App. 2001). In *T.J.K,* the Court of Appeals of Texas reversed a lower court's order finding that a father's reliance on the Supreme Court's decision in *Troxel* did not establish sufficient grounds to modify a previous order granting

grandparent visitation. In that case, there had been an agreed order of visitation, but following the decision in *Troxel,* the father sought to terminate the grandparent visitation, asserting that there was no longer any basis in law for the grandmother to access the child. The grandmother countered that the father waived his constitutional argument when he consented to the agreed order of visitation. The court of appeals stated that there was no waiver, because it was a case in which the trial court retained continuing jurisdiction and had the right to alter the visitation order. In concluding that the father had the right to challenge Texas's grandparent - visitation act, the court stated:

Sam has no less a right to seek modification of the order because a statute is found unconstitutional than because of a change of fact. If a statute that authorized a term or condition of visitation is declared unconstitutional, that change should operate like any other change in circumstances that potentially makes the order unworkable or inappropriate. There is nothing in the statute that limits that change in circumstances to factual changes rather than changes in law.

*Id.* at 832.

In reaching its conclusion, the Texas court did not address the doctrine of *res judicata* or its effect in custody cases. Thus, we are more persuaded by the rationale of the Oklahoma Supreme Court that a change of circumstances that prevents the application of *res judicata* is a change in the circumstances of the parties, not the law.

Here, we have a court order that was issued after *Troxel* declared the Washington grandparent-visitation statute unconstitutional. Greg raised a challenge to the Arkansas GPVA based on that decision in *Troxel.* When he did not prevail on that issue, he failed to appeal it to this court. If he

had appealed, he may well have prevailed as the parent did in *Linder,* however, the fact that he failed to pursue an appeal now prevents him from challenging the trial court's previous order finding the statute constitutional. In sum, because we have a case that involves the same parties, the same issue, and has already been decided by a court of competent jurisdiction, the doctrine of *res judicata* is applicable. Accordingly, we cannot say that the trial court erred on this point.

For his second point on appeal, Greg argues that the trial court erred in denying his motion for reconsideration or new trial because his argument that the GPV A is unconstitutional on its face is not barred by the doctrine of *res judicata,* as it was neither raised nor ruled upon in the prior litigation. Specifically, Greg relies on a footnote in this court's opinion in *Seagrave,* 349 Ark. 433, 79 S.W.3d 339, wherein we noted that all of the GPVA, except the subsection that allows visitation when no parent has custody, had been declared unconstitutional. Greg argues that the whole act must be stricken, despite the one section that this court ruled was unconstitutional, because the purpose of the act is to accomplish a single object. We disagree.

In raising this argument, Greg ignores a well-settled principle of the *res judicata* doctrine, namely that it includes issues that could have been raised in the first litigation. *See, e.g., Arkansas La. Gas Co. v. Tqylor,314* Ark. 62, 858 S.W.2d 88 (1993); *Talbot v. Jansen,* 294 Ark. 537, 744 S.W.2d 723 (1988). In this case, when Nancy first filed her petition for visitation, Greg sought summary judgment, arguing that the GPV A was unconstitutional because it violated his rights under the Fourteenth Amendment's Due Process Clause. In making this argument, he relied heavily on the Supreme Court's decision in *Troxel.* The trial court subsequently ruled that the GPV A was constitutional, noting that it was more

restrictive than the Washington statute and that it created a presumption that a court will give due consideration to a parent's decision regarding visitation. In sum, the court's order made no distinction as to whether the statute was constitutional on its face or as applied to Greg's case, despite the fact that Greg was free to argue that the GPV A was unconstitutional on its face. Thus, *res judicata* bars Greg from now attacking the GPV A as unconstitutional on its face.

For his third point on appeal, Greg argues that the trial court erred in refusing to terminate Nancy's visitation in this case because the evidence demonstrated that a change in circumstances warranted such termination. According to Greg, there have been two specific changes in circumstances: (1) the change in the constitutional landscape following this court's decisions in *Linder,* 348 Ark. 322, 72 S.W.3d 841, and *Seagrave,* 349 Ark. 433, 79 S.W.3d 339; and (2) changes in his children's behavior since visitation was ordered. We do not agree that there was sufficient evidence warranting termination of visitation.

We again reiterate that Greg's argument that the legal changes to the GPV A following our decisions in *Linder* and *Seagrave* are not the type of changed circumstances that warrant modification of the visitation order. With that said, we must now determine whether there were material changes in circumstances that warranted termination of Nancy's visitation.

In reviewing chancery cases, we consider the evidence *de novo,* but will not reverse a trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Hamilton v. Barrett,* 337 Ark. 460, 989 S.W.2d 520 (1999); *Jones v. Jones,* 326 Ark. 481, 931 S.W.2d 767 (1996). We give due deference to the superior position of the

trial court to view and judge the credibility of the witnesses. *Noland v. Noland,* 330 Ark. 660, 956 S.W.2d 173 (1997). This deference to the trial court is even greater in cases involving child custody, as a heavier burden is placed on the trial judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Hamilton,* 337 Ark. 460, 989 S.W.2d 520.

With this standard in mind, we turn to the evidence presented regarding the children since they began the court-ordered visitation. Charlotte Carlson, a licensed counselor who had been working with the Hunt family, testified about behavioral changes that she noted in the children since the visitation began, specifically that they seemed to have abandonment issues. She also testified about negative statements each child had made regarding their grandmother and their visits with her. Despite this, Carlson admitted that she had never recommended terminating Nancy's visitation. Moreover, Dr. Steven Shry stated that any behavioral problems exhibited by the children could be the result of either the blending of Greg's and Gretchen's families or the visitation, or both. Moreover, Dr. Shry testified that none of the tests he conducted indicated that either child had a problem with visiting their grandmother. The trial court took all this testimony into consideration and concluded that there were no material changes warranting termination of the visitation order. Deferring to his superior position to evaluate the testimony and consider the best interests of the children, we cannot say that he erred on this point.

Affirmed.

1 Section 9-13-103 was amended by the General Assembly in 2003, following this court's holdings that the statute was unconstitutional as applied in *Seagrave v. Price,* 349 Ark.

433, 79 S.W.3d 339 (2002), and *Linder v. Linder,* 348 Ark. 322, 72 S.W.3d 841 (2002).

2 Greg spends much of his brief emphasizing the fact that the Supreme Court vacated and remanded an Arizona court order granting grandparent visitation in *Dodge v. Graville,* 533 U.S. 945 (2001). The fact that the Court vacated the Arizona case is, however, of no import in the present case.

IN THE ARKANSAS SUPREME COURT

GREG HUNT APPELLANT

VS CASE NO. 03-00420,

NANCY PERRY APPELLEE

APPEAL FROM THE CIRCUIT COURT OF YELL COUNTY, ARKANSAS

THE HONORABLE WILLIAM R. BULLOCK, CIRCUIT JUDGE and
THE HONORABLE DAVID McCORMICK, CIRCUIT JUDGE

# PETITION FOR REHEARING AND BRIEF OF APPELLANT

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## POINT FOR REHEARING

### POINT I.

THIS COURT'S DECEMBER 11, 2003 OPINION IS PREMISED UPON AN INCORRECT INTERPRETATION OF *BOYLES V BOYLES,* 268 ARK., 120, 594 S.W. 17 (1980) AND *ORR* V. *ORR,* 440 U.S. 268 (1979), AS WELL AS A COMPLETE LACK OF CONSIDERATION OF THE IMPORT OF *DODGE* V. *GRAVILLE,* 533 U.S. 945 (2001).

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## ARGUMENT

### POINT 1.

THIS COURT'S DECEMBER 11,2003 OPINION IS PREMISED UPON AN INCORRECT INTERPRETATION OF *BOYLES V BOYLES,* 268 ARK., 120,594 S.W. 17 (1980) AND *ORR* V. *ORR,* 440 U.S. 268 (1979), AS WELL AS A COMPLETE LACK OF CONSIDERATION OF THE IMPORT OF *DODGE* V. *GRAVILLE,* 533 U.S. 9.45 (2001).

Appellant Greg Hunt, for his Petition for Rehearing contends this Court's December 11, 2003 Opinion denying, on *res judicata* grounds, appellant's ability to challenge the Trial Court's constitutionality order is premised upon an incorrect interpretation of *Boyles* v. *Boyles,* 268 Ark., 120, 594 S.W. 17 (1980) and *Orr* v. *Orr,* 440 U.S. 268 (1979), as well as a complete lack of consideration of the import of *Dodge* v. *Graville,* 533 U.S. 945 (2001).

In *Boyles,* supra, Mr. Boyles did not assert a constitutional challenge prior to the original divorce decree of May 1, 1969, nor did he do so prior to the January 22, 1979 *Arrearage/Contempt* Order. He raised, for the first time, the cry of unconstitutionality by petition filed March 7, 1979 (2days after the *Orr,* supra, decision).

Conversely, Mr. Hunt raised the cry of unconstitutionality prior to the first hearing (and subsequent to *Troxel,* infra); prior to the second hearing and subsequent to *Linder* v. *Linder,* 348 Ark. 322, 72 SW 3d (2002), and *Seagrave* v. *Price,* 349 Ark 433, 79 SW 3d 339 (2002); and by Motion for Reconsideration and New Trial.

In *Boyles,* supra, this Court, in specifically examining the Trial Court's Order, was bound by the U.S. Supreme Court's direction in *Orr,* supra, to ascertain "whether any grounds of gender neutral state law bound the husband to continue the alimony payments involved there." *(Boyles,* supra, at page 20)

It was the plethora of non-gender based grounds that precluded the Trial or Appellate Court from reversing the earlier alimony award, rather than *res judicata* "trumping" the appellant's recently pronounced constitutional right.

The *Boyles* Court, itself, recognizes "that, if the rights of the appellee were dependent solely on the statute, she might have no vested rights, because we have held no rights can be predicated upon an unconstitutional statute, because it must be treated as if it had never been passed." *(Boyles,* supra, at page 19) It is at this point that the *Boyles* Court examines the Trial Court decree for other non-gender based factors to "save it" because "the issue actually turned upon the effect of the (Trial Court) Decrees and Orders." *(Boyles,* supra, at page 19)

In *Orr* v. *Orr,* supra, the U.S. Supreme Court did not find it an impediment that Appellant had failed to timely challenge the constitutionality of the statute therein involved: "No constitutional challenge was made at the time of the original Decree. Mr. Orr did not interpose the Constitution until his ex-wife sought a contempt judgment against him... This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear Mr. Orr's constitutional arguments, we might have been without jurisdiction to consider it here....(but) in such circumstances, the objection that Mr. Orr's complaint "comes to late" is clearly untenable." *(Orr,* supra, at page 274)

Despite the following dissent of Justice Powell, the U.S. Supreme Court took jurisdiction and declared the statute unconstitutional: "If, in these circumstances, provisions of a divorce decree are subject to collateral attack grave questions will arise in Alabama and other states. It hardly need be said that the policy of repose embodied in a prohibition of collateral attack has especial importance with respect to alimony and divorce decrees." *(Orr,* supra, at page 286) Further, Justice Powell said, "If Appellant's collateral attack on the terms of the divorce decree could not be properly entertained under Alabama state law... the question whether

this Court may exercise jurisdiction over the dispute would be close and difficult." Nevertheless, the U.S. Supreme Court took jurisdiction and struck down the alimony statute and remanded to see if "other grounds of "gender-neutral state law bind (the husband). . ." *(Orr,* supra at 284)

In *Dodge* v *Graville,* supra, the U.S. Supreme Court was again unrestrained *by "res judicata", "untimeliness",* or *"policy of repose"* in reversing and remanding an unconstitutional state court Order.

Before the Dodge case made it to the U.S. Supreme Court there were three separate state court decisions: *In re Graville,* 195 Ariz. 119, 985 P. 2d 604 (1995) (hereinafter *Dodge I; Memorandum of Decision* (unpublished) rendered Nov. 26, 1999, 1-CA-SA-99-0235 (hereinafter *Dodge II;* and *Graville* v *Dodge,* 197 Ariz. 591,5 P. 3d 925 (May 23,2000) (hereinafter *Dodge lII.* Only *Dodge 1* and *Dodge III* will be referred to hereinafter.

In *Dodge 1* the Court below awarded the maternal grandparents visitation with the children of their deceased daughter. The children's father, Dodge, challenged the constitutionality of this Arizona GPV A. The Trial Court in *Dodge 1* declared the GPV A statute constitutional and Dodge appealed to the Arizona Appellate Court, which concluded that "the statute was rationally related to furthering the state's legitimate interest... and (therefore) the statute is constitutional."

Dodge did not appeal the *Dodge 1* Appellate Court decision to the U.S. Supreme Court.

Five years subsequent, in *Dodge lll,* the Arizona Appellate Court again revisited the grandparental visitation issue.

In that appeal, Dodge asserted various arguments, including a new argument that the most recent Judge Hendrix Contempt Order was an unconstitutional application of the grandparents visitation statute.

The Arizona Court of Appeals, in addressing this purportedly new unconstitutional application argument, stated

that the Court had already concluded in *Dodge I* that "The visitation order did not constitute a substantial or unconstitutional interference with Dodge's parental rights." In footnote 2 of *Dodge III* the Arizona Court acknowledged Dodge's reference to the then pending U.S. Supreme Court case of *Troxel* v *Granville,* but declined to apply a "strict scrutiny analysis", instead the Arizona court said "We addressed that issue in *Dodge I,* where we chose to apply a rational basis standard, not a strict scrutiny one, in determining that the statute is constitutional."

Despite the fact that Dodge had failed to appeal the *Dodge I* Arizona Appellate Court decision to the U.S. Supreme Court, the U.S. Supreme Court was not deterred from hearing the appeal (certiorari) of *Dodge III* nor from declaring "The Motion of the AARP for Leave to File Brief as Amicus curiae is granted. The Petition for Writ of Certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of Arizona, Division I, for further consideration in light of *Troxel* v *Granville,* 530 U.S. 57 (2000)." (*Dodge* v *Graville,* supra)

The import of this three sentence United States Supreme Court Order vacating the Arizona Court Judgment which granted grandparental visitation is that a fit parent is not precluded from (re-) alleging the unconstitutionality of a grandparental visitation statute despite the fact that issue may have already been decided adversely by the Trial Court and not appealed by the fit parent to the U.S. Supreme Court. Accordingly, the Arkansas Supreme Court should not deem itself precluded from protecting a fit parent's fundamental right merely because the fit parent failed to perfect an appeal of an earlier unconstitutional Trial Court Order.

Justice Corbin in this Court's December 11, 2003 Opinion says, "... Greg ignores a well-settled principle of the *res judicata* doctrine, namely that it includes issues that could have been raised in the first litigation" (citations omitted).

However, Mr. Orr failed to raise the unconstitutionality argument "in the first litigation" and only did so two years later in response to a contempt action. Similarly, Mr. Dodge failed to raise by appeal (cert.) to the U.S. Supreme Court the first adverse state court ruling to his unconstitutionality challenge, and only did so five years later in response to a contempt action.

Yet in both cases, under similar circumstances, the U.S. Supreme Court reached the merits of the cases and issued its unconstitutionality rulings.

If the U.S. Supreme Court is unimpeded by "res judicata", *"untimeliness"*, or "*policy of repose*", from pronouncing and protecting newly enunciated constitutional rights of individuals, why should this court, in rigid fidelity or slavish adherence to *"res judicata"* elect to fail to protect such rights recently enunciated by this Court?

Appellant submits it should not, and that this Court should in fidelity to individual constitutional rights, grant Appellant's petition for rehearing and reverse and dismiss the Trial Court's Order.

Respectfully submitted,

Greg Hunt, Appellant
By: /s/ Joel W. Price

## CERTIFICATION

I, Joel W. Price, Attorney for Appellant, Greg Hunt, certify that it is my considered legal opinion that this Petition for Rehearing is meritorious and is not submitted for the purpose of delay.

By: /s/ Joel W. Price
Attorney for Appellant
515 Garrison Avenue
30
Fort Smith, AR 71901
(479) 782-3201
ABA #78129

## CERTIFICATE OF SERVICE

I, Joel W. Price, do certify that a true and correct copy of the above and foregoing has been delivered via fax and US Mail to the following: John R. Peel, Peel Law Finn, P.A., 120 So. Glenwood, P.O. Box 986 Russellville, AR 72811.

By: /s/ Joel W. Price

Office of the Clerk
Leslie w. Steen, Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72202

January 15, 2004

Joel William Price
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515 Garrison Avenue
Fort Smith, AR 72901

Re: 03-00420 Greg Hunt v. Nancy Perry

Dear Mr. Price:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Dickey, C.J. not participating."

Sincerely
/s/ Leslie W. Steen, Clerk

LWS:jko
Cc:John Peel
Carolyn Morris, Clerk
(E-00-88)

MANDATE

AFFIRMED LAW

STATE OF ARKANSAS
In the Supreme Court

Proceedings of December 11, 2003

03-420
GREG HUNT APPELLANT
V. Appeal from Yell Circuit, Southern District
(E-00-88)
NANCY PERRY APPELLEE

This appeal was submitted to the Arkansas Supreme Court on the record of the Circuit Court of Yell county and briefs of the respective parties. After due consideration, it is the decision of the Court that the judgment of the trial court is affirmed.

It is also ordered that the appellant pay the appellee $180.00 for brief costs in the appeal.

In Testimony, that the above is a true copy of the judgment of the Arkansas Supreme Court, I, Leslie W. Steen, Clerk, set my hand and affix the seal this 15th day of January, A.D. 2004.

/s/ Leslie W. Steen
Clerk